
JOINT LEGAL CUSTODY: WHAT IS IT?

By

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I. INTRODUCTION AND SCOPE NOTE

Although most child custody cases do not typically involve large sums of money, provocative evidence as in some alimony actions, or evolving law as in many equitable distribution cases, I have always believed that child custody cases are the most important family law matters because they impact the most on human lives.

This particular continuing legal education manuscript is intended to be a brief practical guide on the rather narrow topic of just what is this thing called "joint legal custody."

For a more formal and broader discussion on the issue of "child custody" in general (including 41 pages of text, 158 case citations, 22 suggested reference materials, and 225 pages of suggested sample pleadings and orders), I would humbly refer you to my chapter VI entitled "**Managing a Child Custody Case**" that was part of the North Carolina Bar Foundation CLE seminar "Family Matters: 2009 Basics of Family Law" held at the North Carolina Bar Center in Cary, North Carolina on November 13-14, 2008. Because my table of contents for that particular CLE manuscript was inadvertently omitted, a copy thereof is attached at the end of this manuscript as "Exhibit D."

II. WHEN IS "JOINT LEGAL CUSTODY" POSSIBLE AND FINDINGS OF FACT

Although North Carolina General Statutes Section 50-13.2(b) allows a trial judge to grant joint legal custody to both parents, many judges may tend to conclude that the fact that the parents are engaged in litigation over the custody of their minor children is a *prima facie* indication that the parents are not capable of the requisite ability to cooperate with one another with regard to the welfare of their children. Therefore, while joint legal custody is becoming a more popular phenomenon today, I would suggest that expectations for such results are best reserved for consent orders and separation agreements, rather than following contested custody hearings before the court.

Nevertheless, by stressing how the parents may have been able to cooperate with one another in the past concerning matters relating to the welfare of their minor children, and sometimes with the assistance of a psychologist's recommendation, the custody practitioner can in fact persuade the court to award "joint legal custody" at the conclusion of a contested custody hearing. See Annot., Propriety of Awarding Joint Custody of Children, 17 A.L.R.4th 1013.

Examples of matters wherein parents have demonstrated their ability to cooperate with one another in making decisions on a pre-litigation basis that could be included in appropriate and relevant findings of fact supporting an award of "joint legal custody" following a contested hearing might include:

- the parents were able to agree on the choice of medical, dental, and/or psychological providers for the children;

- the parents were able to agree on whether or not the children would attend public or private school, and which school in particular;
- the parents were able to work out a reasonable visitation or physical custody schedule, or were able to abide by the visitation or physical custody schedule set out in an interim agreement or temporary custody order;
- the parents were able to agree on the same set of rules and limitations for their children, including the same set of consequences for violations of such rules and limitations;
- the parents were able to agree on such social matters as the appropriate age for their children to commence dating, to use certain cosmetic products, or to have body piercings;
- the parents were able to agree on their children's use of certain motorized vehicles, including especially such things as all-terrain vehicles or motor scooters; *etc.*

It is the opinion of this presenter that the trial court must consider the option of "joint legal custody" of the minor children if such is requested by either or both of the parents to the action. Therefore, it would appear to be good practice to ask for "joint legal custody" in one's child custody pleadings, even if only in the alternative to one's client's being granted "sole legal custody."

III. CONCLUSIONS OF LAW

In addition to findings-of-fact in a custody order providing for "joint legal custody" that demonstrate the parents' ability to cooperate with one another at least for the purpose of determining what would promote the general welfare of their minor children, such order must also include a conclusion-of-law to the effect that:

"It is in the best interest of the parties' aforesaid minor children that their legal custody be granted to the Plaintiff and the Defendant herein jointly."

or

"It is in the best interest of the parties' aforesaid minor children, and would promote their general welfare, that the Plaintiff and the Defendant be granted the joint legal custody of the parties' aforesaid minor children."

IV. SO WHAT DOES "JOINT LEGAL CUSTODY" MEAN OR NOT MEAN?

In drafting an order providing for "joint legal custody," the practitioner should be specific as to the parties' respective responsibilities and obligations, since the appellate

courts have determined that the term "joint custody" is ambiguous and does not in and of itself imply specifics without consideration of all relevant extrinsic evidence of intent being required. Patterson v. Taylor, 140 N.C. App. 91, 535 S.E.2d 374 (2000). In other words, the term "joint legal custody" in an order only means what the order says that it means, and, in the absence of such a specification as to what "joint legal custody" in an order means, the appellate courts may well conclude that the use of just those three words means nothing. In my orders, after stating that the parties are granted the joint legal custody of their minor children, I typically add the following separate paragraph for clarification:

"The parties hereto shall discuss and shall reach a mutual agreement with regard to all major decisions affecting the best interest and general welfare of their aforesaid minor children, including, by way of illustration and not limitation, the said minor children's health, medical treatment, education, religious upbringing and extracurricular activities, *etc.* In the event that the parties' minor children are already engaged, for example, in a particular extracurricular activity, then it would be incumbent upon the party wishing to delete that extracurricular activity to convince the other party to agree before changing the status quo for the minor children. In order to enroll the parties' minor children in a new extracurricular activity, it would also be incumbent upon the party wishing to add that extracurricular activity to convince the other party to agree to add such extracurricular activity."

V. AND WHEN WILL THE TRIAL COURT'S AWARD OF "JOINT LEGAL CUSTODY" NOT BE UPHeld?

A trial court's custody order which awarded the parties "joint legal custody," while simultaneously granting the mother the "primary decision-making authority" was reversed by the North Carolina Court of Appeals because the trial court's custody award was inconsistent with the phrase "joint legal custody." Diehl v. Diehl, 177 N.C. App. 642, 630 S.E.2d 25 (2006).

However, this presenter is of the opinion that a trial court may in fact be able to grant "joint legal custody" to both parents in general, but, for a compelling finding-of-fact reason (such as the father is a physician), may say that one parent (such as the aforesaid father) may be entitled to make the final decision on a specific matter (such as the appropriateness of a certain medical procedure) if the parents are unable to reach a decision after a genuine attempt to resolve the issue upon mutual agreement.

VI. WHAT RIGHTS DOES A PARENT HAVE WHEN THE CUSTODY ORDER DOES NOT PROVIDE FOR "JOINT LEGAL CUSTODY"?

Pursuant to North Carolina General Statutes Section 50-13.2(b), absent an order of the court to the contrary, each parent shall have equal access to the records of the minor child involving the health, education and welfare of the minor child, even if one parent has not been granted joint legal custody, but only visitation rights with the minor child.

It is the opinion of this presenter that either parent can authorize emergency medical treatment for a minor child, although only the individual parent with "sole legal custody" may authorize elective medical treatment. If parents have "joint legal custody," either parent may be able to authorize elective medical treatment, but I know that the ethical requirements of psychologists require the knowledge and consent of both parents in a "joint legal custody" situation before psychological counseling of a minor child would be proper.

VII. TERMINOLOGY

It is respectfully submitted that the practitioner in a child custody order should designate separately "legal custody" and "physical custody." Legal custody refers to decision making by one or both parents. Physical custody refers to where the children reside and when.

A. With regard to legal custody (sole):

In adjudicatory paragraphs, the practitioner may refer to sole decision-making as:

- "The Plaintiff be, and he hereby is, granted the exclusive care, custody and control of the parties' aforesaid two minor children."

or

- "The Plaintiff be, and he hereby is, granted the sole legal custody of the parties' aforesaid two minor children."

B. With regard to legal custody (joint):

In adjudicatory paragraphs, the practitioner may refer to joint decision-making as:

- "The Plaintiff and the Defendant be, and they hereby are, granted the joint care, custody and control of the parties' aforesaid two minor children."

or

- "The Plaintiff and the Defendant be, and they hereby are, granted the joint legal custody of the parties' aforesaid two minor children."

C. With regard to visitation (when the other parent has sole legal custody):

- "The Defendant be, and she hereby is, granted reasonable visitation with the parties' aforesaid two minor children as follows: . . . "

- D. With regard to physical custody (when both parents have been granted joint legal custody and equal physical custody):
- "The Plaintiff and the Defendant be, and they hereby are, granted the equal physical custody of the parties' aforesaid two minor children as follows: . . ."
- E. With regard to physical custody (when both parents have been granted joint legal custody, but when one parent has been granted primary physical custody and the other parent has been granted secondary physical custody):
- "The Plaintiff be, and he hereby is, granted the primary physical custody of the parties' aforesaid two minor children; and the Defendant be, and she hereby is, granted the secondary physical custody of the parties' aforesaid two minor children as follows: . . ."
- or*
- "The Plaintiff and the Defendant be, and they hereby are, granted the shared physical custody of the parties' aforesaid two minor children, with the Plaintiff exercising the primary physical custody of the said two minor children, and with the Defendant exercising the secondary physical custody of the said two minor children as follows: . . ."

Please note that this presenter contends that the word "visitation" should only be used with regard to one parent when the other parent has been granted "sole legal custody," whereas the words "equal physical custody" or "primary/secondary physical custody" should be used only when both parents have joint legal custody and either equal physical custody or primary/secondary physical custody respectively.

VIII. EXAMPLES OF PHYSICAL CUSTODY SCHEDULES

It is respectfully suggested by this presenter that sample calendars or charts should be attached to child custody orders for the purpose of clarifying and providing concrete examples of what carefully drafted prose set out in the main body of the child custody order means with regard to who has physical custody of the children on which overnights. I specify "overnights," because children can spend different parts of one day with each parent, but such children will hopefully spend only the night on any given date with just one parent.

Immediately following this paragraph are examples of some physical custody sample calendars or charts that I have utilized or to which I have been exposed in my multi-county mediation practice. Although it really does not make much difference, I use the letter "F" to represent fathers and the letter "M" to represent mothers, although (when color printing is available) I prefer coloring the days of the week for each parent with blue and pink highlighting for fathers and mothers respectively.

EQUAL PHYSICAL CUSTODY (reference to overnights only)

(one of several options: this one alternating weeks with switch on Friday afternoons)

	SUN	MON	TUE	WED	THU	FRI	SAT
Week 1	F	F	F	F	F	M	M
Week 2	M	M	M	M	M	F	F
Week 3	F	F	F	F	F	M	M
Week 4	M	M	M	M	M	F	F

advantage: less back and forth

disadvantage: parent away from child for 7 days

EQUAL PHYSICAL CUSTODY (reference to overnights only)

(one of several options: this one same two-same two-alternating three)

	SUN	MON	TUE	WED	THU	FRI	SAT
Week 1	M	M	M	F	F	F	F
Week 2	F	M	M	F	F	M	M
Week 3	M	M	M	F	F	F	F
Week 4	F	M	M	F	F	M	M

advantage: stability on weekdays

disadvantage: parent still away from child for 5 days

EQUAL PHYSICAL CUSTODY (reference to overnights only)

(one of several options: this one alternating two-alternating two-alternating three)

	SUN	MON	TUE	WED	THU	FRI	SAT
Week 1	M	F	F	M	M	F	F
Week 2	F	M	M	F	F	M	M
Week 3	M	F	F	M	M	F	F
Week 4	F	M	M	F	F	M	M

advantage: parent only away from child for 2 or 3 days

disadvantage: more exchanges

FORMER MINIMAL VISITATION OR SECONDARY PHYSICAL CUSTODY
(reference to overnights only)

	SUN	MON	TUE	WED	THU	FRI	SAT
Week 1	M	M	M	M	M	F	F
Week 2	M	M	M	M	M	M	M
Week 3	M	M	M	M	M	F	F
Week 4	M	M	M	M	M	M	M

no mid-week contact and only two overnights on alternate weekends

MORE CURRENT MINIMAL VISITATION OR SECONDARY PHYSICAL CUSTODY
(reference to overnights only)

	SUN	MON	TUE	WED	THU	FRI	SAT
Week 1	M	M	M	F	M	F	F
Week 2	F	M	M	F	M	M	M
Week 3	M	M	M	F	M	F	F
Week 4	F	M	M	F	M	M	M

mid-week overnight and three overnights on alternate weekends
(sometimes Wednesday is for a number of hours only for an evening meal and not for overnight)

REGARDLESS OF THE PHYSICAL CUSTODY SCHEDULE DURING THE SCHOOL CALENDAR YEAR, THE SCHOOL SUMMER VACATION PERIOD ALLOWS FOR MORE TIME AND FLEXIBILITY FOR THE PARENT WHO IS EXERCISING ONLY VISITATION OR SECONDARY PHYSICAL CUSTODY.

WHEN PARENTS LIVE IN DIFFERENT COUNTIES OR IN DIFFERENT STATES, GIVING ONE PARENT PRIMARY PHYSICAL CUSTODY DURING THE SCHOOL YEAR AND THE OTHER PARENT PRIMARY PHYSICAL CUSTODY DURING THE SCHOOL SUMMER VACATION PERIOD ALSO ALLOWS FOR MORE TIME AND FLEXIBILITY FOR THE PARENT WHO IS EXERCISING ONLY VISITATION OR SECONDARY PHYSICAL CUSTODY.

EXHIBIT A

BEST PARENT: *Change for children's sake*

Divorce is good mostly for the lawyers. They make a lot of money from divorces, working out alimony, child support and custody while the meter keeps ticking. These issues are never easy to resolve, but the "best" divorces are those in which the parents can keep the best interest of the child always in sharp focus.

That's always more difficult when rancor trumps reason and the concerns of the children give way to spite and ego, and a spouse's anger with the other surpasses sensitivity and common sense. This is the stuff of countless books and movies. The literature begins with Medea, who murdered her children to punish her husband. Less spiteful parents impose softer gradations of suffering on children when a marriage fails. It doesn't have to be so. Customs, like time, can change.

"Blended" family holidays are increasing, where remarried husbands and wives with a mixture of children celebrate together. Divorced parents share summer houses (at separate times, I hope) so that their children can enjoy an extended stay in the same house where they've developed friendships and familiarity.

But lurid headlines about "deadbeat dads" still identify delinquent parents who refuse to pay child support, even when affluence puts no strain on pocketbooks. Circumstances always alter cases, but David Levy, the director of the Children's Rights Council, blames a social system that emphasizes the importance of financial support without focusing nearly the attention that emotional support should get. When child-support laws began to tighten in the 1980s, fathers were often kept out of the child's life. Fathers weren't needed, but their dollars were.

"The country saw wage withholding,



Suzanne Fields

liens against property, interception of federal and state tax returns, publication of 'most wanted' lists of child-support delinquents, and arrests in the middle of the night, where dads were handcuffed in their pajamas and hauled off to court," Levy says. Sometimes this was warranted; many angry men were in fact withholding support because their wives were withholding access to their children.

"Men were offended by the idea that a woman could initiate divorce, obtain custody and support, and reduce the father to the role of Disneyland Daddy in his own child's life," he says. Fathers saw themselves unfairly treated, and some of them organized the Children's Rights Council to lobby Congress for joint custody laws and for what's called "shared parenting" — one parent may be held responsible for financial support but both parents are held responsible for emotional support. Children's rights, as fathers argued before congressional committees, meant fathers' rights, too.

Joint custody, just as sole custody, can work well or not at all. What matters is the mental health of the parents and the quality of child-parent relationships. Needs can often change with a child's age.

While one size does not fit all, it's difficult to object to an increased emphasis on shared parenting for divorced parents.

This doesn't necessarily mean equal time, but an amicable commitment of time and cooperation. Governments spend \$4 billion a year to collect financial support

but only \$109 million annually on parenting education, counseling, mediation and other things.

The emotional benefits stemming from a parent's psychological participation in a child's life are harder to measure than the benefits paid for by hard cash. Levy objects to such a facile interpretation. "The lack of two parents in a child's life is the most significant fact producing more crime, drugs, lack of school performance, and teenage pregnancy in young people," he says. Such data has been used in campaigns to foster fatherhood in single-parent families, but he doesn't think enough has been said on behalf of those fathers of divorce who remain vulnerable to vindictive wives. Preliminary data even suggests that certain states with high joint-custody rates have lower divorce rates, suggesting that if you can't get your "ex" out of your life, maybe you might as well consider reconciliation. This might be the greatest benefit of all for the kids.

The Children's Rights Council has become more mainstream — perhaps even mellow — than when it was founded 20 years ago, reflecting the mellowing of feminists who sought "liberation" from the home, directing venom at men and delivering it through the children. Divorce has declined or flattened since, as post-feminism attitudes have revived the importance of family life for both men and women. It's difficult to find someone to disagree with the council's mantra: "The Best Parent Is Both Parents." How to accomplish that is another matter. We'll be working on that for as long as children are the rewards of marriage.

■ Suzanne Fields can be reached at sfields1000aol.com.

THE WASHINGTON TIMES

EXHIBIT B

Children's Rights

Children, whose divorcing parents are involved in a custody dispute, should have the right

- ▶ Not to be asked to choose sides
- ▶ Not to be told the nasty details of the legal proceedings
- ▶ Not to be told "bad things" about the other parent
- ▶ Not to be quizzed about the other parent
- ▶ Not to be used as a messenger between parents
- ▶ Not to be asked to tell lies about the other parent
- ▶ Not to be a parent's legal confidant
- ▶ To express their feelings and to choose not to express certain feelings
- ▶ To be shielded from parental "warfare"
- ▶ Not to feel guilty for loving both parents

Source: Parent Education and Custody Effectiveness

EXHIBIT C

Lawyer's 12 rules for divorced parents provide framework for keeping dignity

Dear Ann Landers: I am a divorce lawyer. Over the years, I have read many letters in your column from divorced mothers and fathers and from their children as well. I have shared several of those columns with my clients, and now I would like to share *my* thoughts with your readers. — N.J.M., Rockville, Md.

Dear N.J.M.: Thank you for the opportunity to pass on some excellent advice. Here it is.

Twelve Commandments for Divorced Parents (Both of You)

1. Never make visitation arrangements directly with children under 12.
2. Never suggest visitation arrangements you have not discussed with the other parent. Always confirm with the other parent any visitation arrangements made with children 12 and over.
3. Send and return children who are clean, well-rested and fed. Do not send or return a sack or suitcase full of soiled clothes.
4. Do not use a telephone-answering device to screen calls from the other parent or limit telephone access between your children and the other parent — except after your children's *actual* bedtime, not the bedtime you would like them to have.
5. Do not discuss divorce disputes with your children or allow them to hear you discussing your differences regarding them.
6. Do not send messages or money with your children.
7. Do not speak ill of the other parent — or of his or her relatives, friends or loved ones.
8. Do not ask your children for information about the other parent's household, friends, income or activities.
9. Do not believe everything you hear from your children.
10. Do not second-guess the other parent re-



garding discipline, rewards or anything else.

11. Give a sympathetic ear to your children, but affirm and reaffirm as often as necessary that you are not a referee or a mediator between them and the other parent.

12. Be courteous. Do not honk your horn for your child to come out. Walk to the other parent's door, but don't go inside unless invited. Have the children ready to go. Always be on time. Smile.

EXHIBIT D

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